No. 92-207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

XAVIER V. PADILLA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS DONALD SIMPSON AND MARIA SIMPSON

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(By Appointment of This Court)

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QUESTIONS PRESENTED

1. Whether the owners of an automobile seized in their absence can contest the legality of that seizure.

2. Whether respondents had a possessory interest in the contraband contained in their car when the car and its contents were illegally seized, entitling them to contest the seizure of the contraband as well as the car.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES:

OTHER AUTHORITIES:

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STATEMENT

On September 26, 1989, Officer Fifer of the Arizona Department of Public Safety stopped a car driven by Luis Arciniega and jointly owned by Respondents Donald and Maria Simpson. Officer Fifer acted without probable cause or even a reasonable suspicion: he had radioed the car's

license plate number to a police dispatcher and, because of some error, he purported to act under the mistaken impression that the car was not carrying the proper license plates. T.R. 5/15/90 at 92, 99-100 (radio conversation with Officer Williamson); see also *id.* at 74 (same, with police dispatcher); Exhibit 9, T.R. 5/15/90 at 83 (police report). Nonetheless, after this mistake came to light, Officer Williamson (who had joined Officer Fifer) seized the car keys from the ignition without permission, opened the locked trunk of the car, and discovered cocaine. T.R. 5/15/90 at 96, 118. A grand jury indicted both of the Simpsons for possessing that cocaine with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1).[1]

1. *The District Court's Decision.* In the United States District Court for the District of Nevada, the Simpsons moved to suppress evidence flowing from the stop of their car or its subsequent search. The district court found that Officer Fifer had no reason to stop the Simpsons' car. It rejected the contention that Officer Fifer had been motivated by the license plate confusion because his testimony in that regard was not credible. Pet. App. 25a-27a. It also rejected the contention that the car's slow speed had been the motivation. *Id.* at 25a, 27a-28a; see also T.R. 5/8/90 at 143; T.R. 5/15/90 at 87. It therefore ruled that the stop was an unconstitutional seizure.

The district court also ruled that the Simpsons had the right to object to the seizure of their vehicle as violating their Fourth Amendment rights. Pet. App. 22a-23a. It ruled that the Simpsons could contest the stop because "the two Simpsons owned the car" and, by briefly loaning it to Arciniega, "they had not given up their interest in the car."

[1] The grand jury also indicted the Simpsons for conspiring to distribute cocaine and conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. § 846.

Id. at 23a. The district court also held that the Simpsons "intended to have control over" the cocaine in the car's locked trunk, and they had gained that control by reason of their participation in "a joint venture for transportation . . . that had control of the contraband." *Id.* at 22a-23a.

After finding both that the stop of the car was unreasonable and that it violated the Simpsons' own property and possessory interests, the district court ordered the fruits of the illegal stop suppressed. *Id.* at 30a. The court also denied the government's subsequent motion for rehearing, which argued that the evidence of the cocaine and a subsequent investigation that resulted from finding that cocaine was attenuated from the unconstitutional stop. "Had there not been a stop," ruled the court, "it is clear to the Court that none of this investigation would have transpired." *Id.* at 34a.

Because it held that all incriminating evidence had flowed from the illegal stop, the district court did not rule on the Simpsons' contention that the subsequent search of their locked trunk was also unconstitutional. Regarding the constitutionality of the search, the district court held that "we just don't get to that issue in this case." *Id.* at 29a; see also T.R. 5/15/90 at 126 (noting that the search was not in issue if "he shouldn't have made the stop").

2. *The Court of Appeals' Affirmance.* In the United States Court of Appeals for the Ninth Circuit, the United States conceded that Officer Fifer had stopped the Simpsons' car without reason and had therefore acted unconstitutionally. Pet. App. 7a. It appealed the district court's determination that the Simpsons' own rights had been violated by that seizure.

In order to determine whether the Simpsons "had an ownership interest in seized . . . property," *id.* at 11a (quoting *United States* v. *Taketa*, 923 F.2d 665, 671 (9th Cir.

1991)), the court of appeals engaged in "fact-specific analysis" that included "the respective possessory interests asserted," Pet. App. 10a (same). In this regard, the court noted that each of the Simpsons "exercise[d] independent ownership of the vehicle." *Id.* at 12a n.3; see also *id.* at 7a ("only the Simpsons owned the vehicle"). Moreover, although "the defendants here did not *own* the contraband," the Simpsons "held a possessory interest in the same sense that the proprietors of a delivery service would possess a package." *Id.* at 11a (emphasis in original). The court also found that each of the Simpsons' own participation in the joint venture to transport cocaine "demonstrated [their] joint control and supervision over the drugs" at the time of their seizure. *Id.* at 14a; see also *id.* at 12a-13a & n.3. "Accordingly, the Simpsons . . . had standing not simply because the Simpsons owned the car and jointly possessed the drugs . . . but also because they participated in the organization, particularly on the day of the stop." *Id.* at 12a.

The court of appeals went on to distinguish the Simpsons' interests, which had been implicated by Officer Fifer's unconstitutional car stop, from the interests claimed by other of their alleged co-conspirators. Thus, the court of appeals reversed the district court with respect to Jorge and Maria Padilla because they did not own the car and "did not control the drugs." *Id.* at 14a.[2] Similarly, the court of appeals reversed the district court's determination with respect to Warren Strubbe because "his mere involvement in a conspiracy does not, by itself, suffice," *id.* at 15a, "[n]or did he own the vehicle," *id.* at 16a.

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[2] It remanded with respect to them, however, for a determination concerning their responsibility for the arrangement that did control the drugs. Pet. App. 15a.

SUMMARY OF ARGUMENT

There are two independent reasons for affirming the lower courts' judgment that the Simpsons' Fourth Amendment rights were violated by Officer Fifer's illegal stop. First, the Simpsons owned the car that Officer Fifer stopped, and for that reason alone they have the right to complain that the car stop was an unreasonable seizure of their "effects." Second, the Simpsons possessed the contraband inside the car, and the illegal stop of the car also constituted an illegal seizure of the contraband contained within. Because the Simpsons may therefore challenge the stop as an illegal seizure of their property, the question presented by the Petition -- which concerns privacy interests relevant only to searches -- has no bearing with respect to the Simpsons.

1. It is settled that a defendant has the right to challenge police conduct that "has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). Where, as here, the conduct at issue is an unreasonable seizure of property, the defendant must show that a property or possessory interest has been affected; neither privacy nor liberty interests are relevant. *Soldal* v. *Cook County*, 113 S. Ct. 538, 543 (1992). Consequently, "one derives standing to object to a seizure of his property solely from the property interest." 4 Wayne R. LaFave, *Search and Seizure* § 11.3(e), at 337 (2d ed. 1987).

Because of their broad property interests, owners of property always have the right to challenge its seizure. Such a seizure infringes one or both of their interests in the property: the right to exclude the government from their property and the right to use their property in whatever way they choose.

Officer Fifer's stop of the car abridged the Simpsons' ownership interests and therefore constituted a seizure of the Simpsons' car. The Simpsons were ousted of their dominion over the car upon Officer Fifer "physical[ly] taking [it] into custody." *California* v. *Hodari D.*, 111 S. Ct. 1547, 1550 (1991) (quoting *Pelham* v. *Rose*, 76 U.S. [9 Wall.] 103, 106 (1870)). Thus, even had Officer Fifer limited himself to a temporary investigative stop, it is well-settled that such stops are Fourth Amendment seizures. He exceeded the scope of a mere investigative seizure, however, and it is thus especially clear that his intrusion was a meaningful interference with the Simpsons' property interests and constituted a seizure.

Because owners of property always have the right to challenge its seizure, and because the stop here constituted such a seizure, that should be the end of the inquiry. But the government incorrectly contends that the Simpsons lost their right as owners to contest the seizure of their car because they were not physically present when it was seized. The Court has recognized, however, that "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects . . . may be made after the owner has relinquished control of the property to a third party." *United States* v. *Place*, 462 U.S. 696, 705 (1983). To now hold otherwise would revive the discredited theory that the Fourth Amendment protects only privacy or liberty, which the Court laid to rest earlier this Term in *Soldal*.

2. The Simpsons have a second possessory interest that was invaded by the stop of their car. In a fact-finding hearing held by the district court, they "establish[ed] the requisite standing by claiming 'possession'" of the contraband locked in their trunk at the time of the stop, as the government accuses them. *Brown* v. *United States*, 411 U.S. 223, 228 (1973). Officer Fifer invaded this possessory

interest because, when his stop asserted dominion and control over the car, it also constituted the "assertion of dominion and control over . . . its contents [that] did constitute a 'seizure.'" *United States* v. *Jacobsen*, 466 U.S. 109, 120 (1984). The invasion of this second possessory interest provides a second basis for the Simpsons' right to challenge the stop.

3. These two bases for the Simpsons' assertion of a Fourth Amendment violation rest solely on property and possessory interests. In its Petition for certiorari, however, the government asked this Court to review only privacy issues. For that reason, the Court may wish to dismiss the writ of certiorari as improvidently granted with respect to the Simpsons.

ARGUMENT

The court of appeals correctly determined that the Simpsons had the right to challenge the illegal stop of their car and its contents, because that stop violated their own Fourth Amendment interests. Although the court assessed the Simpsons' interests by looking to a confluence of factors, we demonstrate below that each factor alone suffices to support the finding that Officer Fifer's illegal stop violated the Simpsons' own property and possessory interests, which are protected by the Fourth Amendment's injunction against unreasonable "seizures" of "effects."

I. THE SIMPSONS MAY CONTEST THE SEIZURE OF THEIR AUTOMOBILE

The Simpsons are the only defendants who hold property interests in the car that Officer Fifer illegally stopped. In holding that the Simpsons' rights were invaded by that illegal police action, both courts below relied in part

on the fact that "the Simpsons owned the car." Pet. App. 12a & n.3; see also *id.* at 23a. We now show that, by itself, this basis is sufficient to affirm the court of appeals' determination with regard to the Simpsons, without the necessity of inquiring into any aspects of the alleged conspiracy.

A. Owners Have The Right To Challenge The Seizure Of Their Property

A defendant has the right to bring a Fourth Amendment challenge when disputed state action "has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). This Court has also instructed that "the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures." *Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Horton* v. *California*, 496 U.S. 128, 133 (1990) (citation omitted).[3] In the context of seizures, therefore, no role is played by the reasonable expectation of privacy that is germane to Fourth Amendment challenges to searches. Rather, "one derives standing to object to a seizure of his property solely from the property interest." 4 Wayne R. LaFave, *Search and Seizure* § 11.3(e), at 337 (2d ed. 1987). Accord *United States* v. *Salvucci*, 448 U.S. 83, 91 n.6 (1980); *Rakas*, 439 U.S. at 142 n.11; *United States* v. *Lisk*, 522 F.2d

[3] Accord *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Texas* v. *Brown*, 460 U.S. 730, 747 (1983) (Stevens, J., concurring).

228, 230 (7th Cir. 1975) (Stevens, J.); *cf. United States* v. *Hillyard*, 677 F.2d 1336, 1338 & n.1 (9th Cir. 1982) (Kennedy, J.).

Property rights have always been considered a grant to an owner of uninterrupted "dominion over his or her . . . property." *Horton*, 496 U.S. at 133. Blackstone regarded property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries *2. An owner's dominion over his property has been described as having at least two parts: "a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for [the owner's] own purposes." *United States* v. *Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring in part and dissenting in part).

A seizure invades both of these interests. By its intrusion, the government invades "the right to exclude," *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979), which the Court has recognized in its Fourth Amendment jurisprudence as "[o]ne of the main rights attaching to property." *Rakas*, 439 U.S. at 144 n.12; see also *Rawlings* v. *Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring). A seizure also interferes with the owner's right to use his property in whatever way he chooses absent "physical invasion by government." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). As the Court has thus recognized with respect to cargo ships, "the owners have a right to employ the ship in such voyages as they may please." *The Steamboat Orleans* v. *Phoebus*, 36 U.S. [11 Pet.] 175, 183 (1837). That recognition applies equally to cars and personal property in general, because "personal property, wherever it may be, is under the personal control of its owner." *Crapo* v. *Kelly*, 83 U.S. [16 Wall.] 610, 622 (1872). Interfering with this facet of an owner's property

interest also constitutes "the invasion of his indefeasible right of . . . private property." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

Because a seizure invades these aspects of a property interest, an owner always has the right to contest the seizure of his own property, as the Court has repeatedly held. *E.g.*, *Soldal* v. *Cook County*, 113 S. Ct. 538 (1992); *United States* v. *Jacobsen*, 466 U.S. 109, 120, 124-25 (1984); *United States* v. *Place*, 462 U.S. 696 (1983). As the Court recognized in *Rakas*, 439 U.S. at 142 n.11 (1978), defendants have the right to "contest the lawfulness of the seizure . . . if their own property were seized." The government thus concedes (Br. 26 n.10) "the general proposition . . . that a person may challenge the seizure of his own property." So far as we know, this Court has never found an exception to this rule; in any event, the United States cites no decision of the Court that has ever denied an owner's right to challenge government action that constituted the seizure of his own property.

This does not mean that one who owns property necessarily has the additional right to contest the search of either that property or the place where that property is kept. In contrast to a seizure, a search implicates only "an expectation of privacy that society is prepared to consider reasonable," *Jacobsen*, 466 U.S. at 113, and for that reason a party may contest a search "only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980). But the police action found illegal by the lower courts -- the unreasonable stop "of the Simpson vehicle being driven by Mr. Arciniega," Pet. App. 29a -- was not a search. As we now show, Officer Fifer's illegal stop constituted a seizure of the Simpsons' car. For that reason, the Simpsons have the right to contest it.

B. The Unreasonable Stop Of The Simpsons' Car Constituted An Illegal Seizure Of Their Car

Under the Court's test, Officer Fifer's illegal stop constituted a seizure of the Simpsons' car. The Court recognized in *California* v. *Hodari D.*, 111 S. Ct. 1547 (1991), that an inanimate object is seized upon a state actor "physical[ly] taking [it] into custody." *Id.* at 1550 (quoting *Pelham* v. *Rose*, 76 U.S. [9 Wall.] 103, 106 (1870)). Officer Fifer's stop was such "an open, visible possession claimed, and authority exercised under a seizure," because of which the Simpsons were "no longer at liberty to exercise any dominion" over their car. *The Josefa Segunda*, 23 U.S. [10 Wheat.] 312, 325 (1825), *cited with approval in Hodari D.*, 111 S. Ct. at 1550. This "assertion of dominion and control . . . did constitute a 'seizure.'" *Jacobsen*, 466 U.S. at 120 & n.18.

The government suggests that the stop seized only Arciniega, but the fact that he, too, was seized does not alter the conclusion that Officer Fifer also seized the car when he stopped it. Indeed, one of the justifications offered for the stop by Officer Fifer was his desire to confirm the suspicion that the car was improperly registered and carrying erroneous license plates. The present situation is thus no different than the stop addressed in *Delaware* v. *Prouse*, 440 U.S. 648, 650 (1979), where the Court found that police had failed to establish any reason "that either the car or any of its occupants [was] subject to seizure."

The United States also contends (Br. 22) that Officer Fifer's illegal action was only a "temporary investigatory stop" that did not "ripen[] . . . into a seizure of the car" until

later events had transpired.[4] This contention is premised on a mistaken view of the law. Although the Court in *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968), relaxed the level of suspicion necessary for temporary investigative seizures, it emphasized that they were seizures nonetheless. Accordingly, even when finding particular temporary stops justified under *Terry*, the Court has always analyzed them as Fourth Amendment seizures. *E.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *Adams* v. *Williams*, 407 U.S. 143 (1972). In other cases, the Court has similarly recognized that vehicle stops constitute seizures. *E.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985); *United States* v. *Hensley*, 469 U.S. 221, 226 (1985); *Colorado* v. *Bannister*, 449 U.S. 1, 4 n.3 (1980); *Prouse*, 440 U.S. at 650, 653. Thus, the government concedes (Br. 7) that the illegal stop, even if temporary, was sufficient to constitute a seizure of Arciniega. Because the stop simultaneously affected the Simpsons' property to the same degree, it was also a seizure of their car.[5]

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[4] The government's contention in this regard is a new argument raised for the first time in the Brief of the United States to this Court. The United States did not present this contention at the suppression hearing, despite the fact that it bears the "burden to demonstrate that the seizure . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida* v. *Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). Nor did it press this contention on appeal. Given the lack of any guidance on this fact-bound issue from the lower courts, this Court should refuse to consider this new argument. *Davis* v. *United States*, 495 U.S. 472, 488-89 (1990); *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958).

[5] The government's *Terry* analogy must also be rejected because *Terry* is relevant only to the level of suspicion necessary to justify an investigative seizure. The United States conceded in the court of appeals that Officer Fifer's seizure of the Simpsons' car was unreasonable under the Fourth Amendment. Thus, while the temporary nature of a seizure

(continued...)

The reason this Court has held that such police conduct constitutes a "seizure" within the meaning of the Fourth Amendment is that even the temporary assertion of superior dominion meaningfully interferes with an owner's dominion over his property. The Court recognized this proposition in *Place*, when it treated as a seizure "the intrusion upon the individual's Fourth Amendment rights when the police briefly detain [his] luggage for limited investigative purposes." 462 U.S. at 705. The Court also applied the amendment's protections in *Soldal*, even though the petitioners' mobile home had only been moved to an adjoining lot, and it was subsequently returned to its original position. When the owners challenged the government's action as a seizure of their property, the Court found that the "removal of the Soldals' trailer home implicated their Fourth Amendment rights," 113 S. Ct. at 543, because even temporary interferences with property interests "plainly implicate the interests protected by that provision." *Id.* at 549.[6]

While even a *Terry*-type stop is a seizure that interferes with owners' property interests, in this case "[t]he manner in which the seizure . . . [was] conducted" by Officer Fifer went

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[5](...continued)
may go to the question of whether or not it was reasonable, *Place*, 462 U.S. at 706, the United States does not bring the issue of reasonableness before the Court in this case.

[6] In the analogous context of the Takings Clause, this Court has declared that temporary deprivations give owners the right to bring a constitutional challenge. *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2891-92, 2901 n.17 (1992); *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987). The Fourth Amendment is analogous to the Takings Clause because these provisions "target[] the same sort of governmental conduct." *Soldal*, 113 S. Ct. at 548; see also *Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring) (drawing analogy).

well beyond the limits of such a stop in at least two respects. *Place*, 462 U.S. at 707-08; *Terry*, 392 U.S. at 28; see also *Dunaway* v. *New York*, 442 U.S. 200, 212 (1979).[7] First, the officers on the scene continued their seizure even after they determined that the car's plates were proper, as both courts below specifically found. Pet. App. 4a, 26a; see also T.R. 5/15/90 at 76-77, 111-15, 157. Second, prior to searching the Simpsons' trunk, Officer Williamson seized from the ignition switch the keys to the vehicle, without consent from Arciniega or anyone else to do so. T.R. 5/15/90 at 96, 118. Because the car's keys were seized, the stop of the Simpsons' vehicle is analogous to a seizure of a person that exceeds the narrow scope of *Terry* "as soon as a suspect's freedom of action is curtailed to a 'degree associated with a formal arrest.'" *Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984) (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983)).[8] In sum, Officer Fifer's stop was clearly a meaningful intrusion that seized the Simpsons' car.

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[7] While a traffic stop may fit under *Terry* if it is merely to determine whether a suspicious registration is in order, the government must demonstrate that its assertedly temporary seizure came to an end as soon as that suspicion was laid to rest. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). Accord *United States* v. *Millan-Diaz*, 975 F.2d 720 (10th Cir. 1992); *United States* v. *Walker*, 933 F.2d 812 (10th Cir. 1991); *United States* v. *Tapia*, 912 F.2d 1367 (11th Cir. 1990); *United States* v. *Rivera*, 906 F.2d 319 (7th Cir. 1990); *United States* v. *Daniel*, 725 F. Supp. 532 (M.D. Ga. 1989); see generally 3 Wayne R. LaFave, *Search and Seizure* § 9.2(f), at 382 & n.139 (2d ed. 1987).

[8] Lower courts have thus found that a traffic stop exceeded the bounds of a temporary investigative seizure if, after an officer stopped a car, he also "took the key from the ignition." *United States* v. *McQuagge*, 787 F. Supp. 637, 646 (E.D. Tex. 1991); see also *Millan-Diaz*, 975 F.2d at 721; *United States* v. *Holifield*, 956 F.2d 665, (7th Cir. 1992); *United States* v. *Birdsong*, 446 F.2d 325, 327 (5th Cir. 1971); *United States* v. *Ospina*, 618 F. Supp. 1486 (E.D.N.Y. 1985); *United States* v. *Whitlock*, 418 F. Supp. 138 (E.D. Mich. 1976), *aff'd*, 556 F.2d 583 (6th Cir. 1977).

C. The Seizure Invaded The Simpsons' Fourth Amendment Rights

We have shown above both that owners of property always have the right to challenge the seizure of their property and that Officer Fifer's stop constituted a seizure of the Simpsons' car. That should be sufficient to end the inquiry with regard to the Simpsons. The government contends, however, that the Simpsons lost their right as owners to contest the seizure of their car because they were not physically present when it was seized.

That contention is incorrect. It is well settled that an absent owner can challenge a seizure of his property, even while it is on loan to another, because "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects . . . may be made after the owner has relinquished control of the property to a third party." *Place*, 462 U.S. at 705; see also *Lisk*, 522 F.2d at 230. Thus, in *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), the Court heard a challenge by an arrestee to the seizure of his car from a public parking lot while he was incarcerated. Both the plurality and dissenting justices analyzed the seizure under traditional Fourth Amendment principles, recognizing that the owner's property interests had survived the bailment and were implicated by the government's action. See also *Soldal*, 113 S. Ct. at 545 (explaining *Cardwell*).[9] To hold otherwise

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[9] The Court similarly inquired into the reasonableness of the seizure in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), which the owner challenged after his car was taken from his driveway while he was away and in custody. Unlike Officer Fifer's seizure, the seizures in both *Cardwell* and *Coolidge* were ultimately found reasonable.

would confuse one who loans his property or places it in a safe-deposit box with one who abandons it. *Cf. Abel* v. *United States*, 362 U.S. 217, 240-41 (1960).[10]

This principle -- that one who entrusts his property to another may contest its seizure during the bailment -- is of ancient origins. According to Blackstone, "the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away." 2 William Blackstone, Commentaries *396. This principle extends equally to seizures that are temporary, which also may be contested by the absent owner. Thus, in *Jacobsen*, a federal agent temporarily seized a package that previously had been placed with a private carrier service. When the customer challenged the temporary seizure out of his presence, the Court recognized that the seizure implicated protected ownership rights and applied Fourth Amendment precepts. 466 U.S. at 120.[11]

The lower federal courts also agree that absent owners have the right to object to the temporary investigative seizure of their property, even if that seizure endured only

[10] As the Court recognized in *Warden* v. *Hayden*, 387 U.S. 294, 301 (1967), the Fourth Amendment continues to shield effects "without regard to the use to which any of these things are applied." In the analogous Takings Clause jurisprudence, the Court has recognized that, even when the owner is absent and has placed his property in a second party's care, he has not abandoned either his property or his right to exclude third parties. *E.g.*, *Loretto* v. *Teleprompter*, 458 U.S. 419, 438-39 (1982) (owner has right to challenge minor physical occupation of property that is being rented).

[11] *Jacobsen* reaffirmed this aspect of *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). In both cases, the postal patrons' ownership interests were ultimately found to have been outweighed by valid grounds for the seizure, which Officer Fifer did not have here.

while the property was out of their physical possession. For example, in *United States* v. *Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976), the Eighth Circuit held that an owner has the right to challenge the temporary seizure of films, which at the time had been shipped from the owner's presence, noting that "[a] contrary conclusion would emasculate the plain language of the Fourth Amendment, which protects 'papers' and 'effects.'" Accord *United States* v. *Haes*, 551 F.2d 767, 769-70 (8th Cir. 1977) (absent owner of films had right to contest their seizure during shipment). Similarly, the Third Circuit has held that "[t]here can be no question of an owner's standing to object to a *seizure* of his property . . ., even when a third party has temporary possession of that property." *United States* v. *House*, 524 F.2d 1035, 1042 (3d Cir. 1975) (emphasis in original). Thus, in a case analytically indistinguishable from the present one, the Third Circuit squarely held that an absent owner of trucks that had been subject to investigative seizures had the right to challenge those seizures. *United States* v. *Shaefer*, 637 F.2d 200 (3d Cir. 1980). In that case, as here, the United States argued that the owner could not contest seizures of his own trucks because he was not present at the time of the investigative seizures, but that contention was rejected because "the Fourth Amendment's prohibition against seizures of property does not depend upon presence of the owner." *Id.* at 203.

The United States does not take issue with the foregoing precedents or analysis, instead placing virtually exclusive reliance (Br. 19 & 21) on the Seventh Circuit's opinion in *United States* v. *Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991), to the effect that the seizure of a car affects only the liberty interests of those who are present. However, even the Seventh Circuit recognized in that case that "ownership carries with it a right to exclude." *Id.* at 1194-95. In declining to apply that principle to the seizure at issue, the Seventh Circuit gave the constitutional protection

against "seizures" of "effects" exactly the cramped reading that the Court overturned earlier this Term in *Soldal*. The Court in that case overturned the Seventh Circuit's theory that seizures only implicate privacy or liberty interests, ruling instead that the Fourth Amendment protects "possessory interests where neither privacy nor liberty [is] at stake." 113 S. Ct. at 543 (reversing *Soldal* v. *Cook County*, 942 F.2d 1073 (7th Cir. 1991) (en banc)).

Nor does *Powell* recognize or address precedents of this Court (such as *Place* and *Jacobsen*) or those of sister courts (such as *Shaefer*) which have found that absent owners have the right to contest even temporary seizures of their property. Because the ownership interest in deploying one's property as he sees fit is separate from a liberty interest in personal freedom of movement, the owners of cars, trucks or freighter ships all have the right to challenge warrantless seizures of their means of conveyance, as the Court has recognized from the earliest days of the Republic. See, *e.g.*, *Gelston* v. *Hoyt*, 16 U.S. [3 Wheat.] 246, 305-06 (1818) (suit by absent owner of ship that was "detained"); *Otis* v. *Watkins*, 13 U.S. [9 Cranch] 339, 353 (1815) (suit by absent owner of seized schooner). For a similar reason, the government is mistaken when it contends (Br. 22) that the seizure of the Simpsons' car is no greater an intrusion of their rights than if Officer Fifer had only delayed its return by seizing Arciniega without illegally seizing the car. Unlike the government's hypothetical, Officer Fifer's seizure was the direct assertion by a state actor of dominion and control over the Simpsons' car, in violation of their Fourth Amendment rights.

Because the Simpsons can challenge the stop of their car, evidence flowing from that stop was rightly excluded from their trial. The district court ruled that the cocaine discovered in the trunk of the Simpsons' car had to be suppressed as fruit of the illegal seizure of the car. Pet.

App. 32a. The United States sought rehearing on the issue of whether the evidence was attenuated from the illegal seizure, *id.* at 31a-34a, and it also appealed this issue to the court of appeals, *id.* at 17a-21a. It has not sought the Court's review of the lower courts' attenuation determinations, however, and for that reason the issue is not before the Court. Accordingly, the court of appeals should be affirmed with respect to the Simpsons.

II. THE SIMPSONS POSSESSED THE CONTRABAND CONTAINED IN THEIR CAR AND THEREFORE MAY CONTEST ITS SEIZURE, WHICH OCCURRED WHEN OFFICER FIFER STOPPED THE CAR AND ITS CONTENTS

There is a second and independent basis for the Simpsons to challenge Officer Fifer's stop and thereby have the evidence flowing from that stop excluded from their trial. Looking to traditional indicia of possession, the court of appeals found that the Simpsons exercised "joint control and supervision over the drugs," Pet. App. 14a, and therefore held a "possessory interest in the drugs" that were locked in their trunk when Officer Fifer, by his stop, asserted dominion and control over both the car and its contents. *Id.* at 11a. As we now show, this aspect of the court of appeals' opinion was correct.

A. The Simpsons Possessed The Contraband Contained In Their Car

It has never been a disputed issue in this case that the Simpsons possessed the cocaine in their trunk when Officer Fifer stopped their car. The government indicted the Simpsons for this possession, and it continues to seek to

predicate criminal liability on precisely this alleged fact.[12] Moreover, in a hearing held pursuant to *Simmons* v. *United States*, 390 U.S. 377 (1968), the Simpsons demonstrated that they possessed the cocaine when it was seized. See generally *Brown* v. *United States*, 411 U.S. 223, 228 (1973) ("the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence").[13] The district court therefore concluded that they "had control of the contraband," Pet. App. 22a, and the court of appeals agreed that the Simpsons "held a possessory interest" in the contraband, *id.* at 11a, by virtue of their "joint control" over it. *Id.* at 14a. While the United States makes other arguments in its Brief, discussed *infra* Section II.C., nowhere does it seek to rebut its recognition (Br. 24) that the Simpsons held a "possessory interest . . . in the cocaine hidden in the trunk."

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[12] The only possession alleged in Count 3 of the indictment was "on or about September 26, 1989, at or near Tucson." C.A. Excerpt of Record Doc. 29, at 3. The Simpsons were not at the place alleged at that time, and in any event the record clearly discloses that only Arciniega had physical control of the contraband in the alleged circumstances. Indeed, the record discloses no instance in which Mr. Simpson ever had physical control of the contraband.

[13] The United States (Br. 26 n.10) erroneously characterizes the analysis we present in text as the "automatic standing rule" of *Jones* v. *United States*, 362 U.S. 257, 261-64 (1960), which was overturned in *Salvucci*. The Simpsons made separate presentations to affirmatively demonstrate their possessory interest at the time of the contested seizure and did not merely rest on the allegations charged in the indictment. It is clear, therefore, that the Simpsons did not take advantage of any rule of "automatic standing." In any event, *Salvucci* concerned searches and not seizures, and the Court in that case was therefore differentiating between the possessory interests alleged by the government's indictment and the privacy interest necessary to assert a Fourth Amendment challenge to a search.

It is for good reason that the government does not contend that the Simpsons are without possessory interests. The district court's finding that the Simpsons "had control of the contraband" and "intended to have control over it," Pet. App. 22a-23a, comports with this Court's recognition that possession may be found when a defendant "had both the ability and the intent to exercise dominion and control." *Ulster County Court* v. *Allen*, 442 U.S. 140, 164 (1979).[14] Similarly, the contraband was concealed in the Simpsons' locked trunk, and "[o]ne who owns a motor vehicle in which contraband is concealed may be deemed to possess the contraband." *United States* v. *Ruiz*, 860 F.2d 615, 619 (5th Cir. 1988) (citing cases); see also *Steagald* v. *United States*, 451 U.S. 204, 209 (1981) (absent defendant's "connection with the searched home was sufficient to establish his constructive possession of the cocaine found in a suitcase in the closet of the house"). The fact that Arciniega was driving the car is of no moment, for possessory interests may be established when the defendant exercises his control and dominion over the item "either directly or through others." *United States* v. *Shackleford*, 738 F.2d 776, 785 (7th Cir. 1984); *United States* v. *Staten*, 581 F.2d 878, 883 (D.C. Cir. 1978); *United States* v. *Craven*, 478 F.2d 1329, 1333 (6th Cir.

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[14] The courts of appeals agree that a defendant may be found to have possessed an item not in his physical control. Whenever the question has arisen in the context of criminal liability for possessing narcotics, the courts have emphasized that, as Judge Posner has put it, "the essential point is that the defendant have the ultimate control over the drugs . . . as the owner of a safe deposit box has legal possession of the contents even though the bank has actual custody." *United States* v. *Manzella*, 791 F.2d 1263, 1266 (7th Cir. 1986); see, *e.g.*, *United States* v. *Ayala*, 887 F.2d 62, 68 (5th Cir. 1989); *United States* v. *Gardea Carrasco*, 830 F.2d 41, 45 (5th Cir. 1987); *United States* v. *Zandi*, 769 F.2d 229, 234-35 (4th Cir. 1985); *United States* v. *Martorano*, 709 F.2d 863, 866-67 (3d Cir. 1983); see generally Wayne R. Lafave and Austin W. Scott, Criminal Law § 3.2(e) (2d ed. 1986); 28 C.J.S. Drugs and Narcotics, Supp. § 158.

1973). The examination undertaken by the court of appeals thus comported with the general test for determining whether the Simpsons themselves had possession of the contraband.

The United States mischaracterizes the decision below as turning on mere participation in a conspiracy. The court of appeals explicitly rejected this very contention, finding that a "'coconspirator exception' . . . would be in clear contravention of holdings of the Supreme Court and this circuit." Pet. App. 16a (citing *Alderman* v. *United States*, 394 U.S. 165, 172 (1969); *United States* v. *Taketa*, 923 F.2d 665, 671 (9th Cir. 1991); *United States* v. *Turner*, 528 F.2d 143, 164 (9th Cir. 1975)). Rather, it followed its own precedent and carefully "engage[d] in fact-specific analysis [of] . . . the respective possessory interests asserted" to determine the question that is relevant to the issue of the Simpsons' right to challenge a seizure -- the nature of the Simpsons' own "ownership interest in [the] seized . . . property." Pet. App. 10a-11a (quoting *Taketa*, 923 F.2d at 671). In this context, the court of appeals found that the Simpsons had proven their own possessory interests and agreed with the government that "mere involvement in a conspiracy does not, by itself, suffice." Pet. App. 15a.

To be sure, the government charged the Simpsons not only with possession but also with conspiracy both to possess and to distribute. For that reason, the court examined the alleged conspiratorial distribution network in order to separate out the Simpsons' own possessory interests from both their mere participation in the alleged conspiracy and the possessory interests of their alleged co-conspirators. To have done any less, the court of appeals would have run afoul of *Brown* v. *United States*, 411 U.S. at 228, and stripped the Simpsons of their right to demonstrate their own

possessory interests in the seized contraband, only because the government also accused them of possessing it as part of a distribution network.[15]

B. The Stop Constituted A Seizure Of The Contraband That Invaded The Simpsons' Possessory Interests

As we have shown, the stop of the Simpsons' car constituted its seizure. It is settled that the seizure of a container, such as a car, also constitutes the seizure of its contents. Thus, in *Jacobsen*, the Court reviewed a challenge to the initial stop of a package and the subsequent destruction of some of its contents. In analyzing its initial stop, the Court recognized that, at its inception, "the agents' assertion of dominion and control over the package and its contents did constitute a 'seizure.'" 466 U.S. at 120. Because the contents had thus been initially seized, the Court found that its subsequent partial destruction "converted what had been only a temporary deprivation of possessory interests into a permanent one." *Id.* at 124-25. Following the same principle, the Court has recognized that a stop of a car constitutes a seizure of its contents, finding that the reasonableness of the car's stop may be judged with exclusive reference to its contents. *E.g.*, *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979).[16] Here, too, when Officer Fifer stopped the car, he also asserted dominion and control over its contents, which from that point on could not be removed.

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[15] The government (Br. 19) finds it "anomalous" that defendants would choose to prove their own possession of contraband in order to challenge a seizure under the Fourth Amendment. But that is precisely what this Court envisioned in *Brown* v. *United States*, 411 U.S. at 228.

[16] *Cf. Place*, 462 U.S. at 701 & n.3 (discussing *Sanders*). This aspect of *Sanders* was not overruled in *California* v. *Acevedo*, 111 S. Ct. 1982 (1991).

The contraband concealed in the Simpsons' trunk was for that reason "seized," in the same manner that the car and driver were seized when Officer Fifer stopped them.[17]

The government seeks to dispute this conclusion on three grounds, but all of its contentions miss the mark. It first argues (Br. 24) that the Simpsons cannot bring their Fourth Amendment challenge "for the same reasons that the mere stop of the car did not constitute an unreasonable seizure." We have shown above, however, that the stop was an unreasonable seizure. The government's two additional points are similarly in error.

1. *Contraband May Be Illegally Seized.* The government asserts (Br. 24) that the Simpsons cannot contest the illegal seizure of the contraband in their trunk because they "were not legally entitled to possess the cocaine." But possessory interest in an item is a sufficient predicate to challenge the seizure of that item, notwithstanding the fact that it is contraband. *Lisk* stands for precisely this point, for it concerned illegal possession of a bomb. 522 F.2d at 229. Indeed, the government's proposed constitutional rule cuts far too broadly, for it would justify any seizure that led to the discovery of contraband, regardless of how unreasonable the police

[17] The United States also points out (Br. 22-23) that, under our analysis, someone who might have loaned a suit of clothes to the driver would also have had his interests invaded by Officer Fifer's illegal seizure of the car and its contents. Under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), however, it is necessary for one who complains of a seizure also to demonstrate that the seizure led to the evidence he seeks to suppress. In the government's hypothetical, the owner of the seized suit could not have demonstrated that the suit's seizure led to the cocaine in the car's trunk. In contrast, had the Simpsons' car and its contents not been seized, "none of this investigation would have transpired." Pet. App. 34a.

conduct. This is simply not the case. *E.g.*, *Place*, 462 U.S. at 710 (concluding that seizure of luggage that contained cocaine was unconstitutional).

The Court thus held long ago that the possession of contraband may be illegal, but "in abrogating property rights in such goods, [Congress] merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment." *United States* v. *Jeffers*, 342 U.S. 48, 53-54 (1951) (citing *In re Fried*, 161 F.2d 453 (2d Cir. 1947)). The government's argument was for that reason rejected in *Trupiano* v. *United States*, 334 U.S. 699, 707 (1948), when the government sought to justify the warrantless seizure of a still on the grounds that it was contraband:

> "The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the illegality of the seizure. See *Amos* v. *United States*, 255 U.S. 313 [(1921)]; *Byars* v. *United States*, 273 U.S. 28 [(1927)]; *Taylor* v. *United States*, [286 U.S. 1 (1932)]."

In arguing to the contrary, the government confuses the possessory interests at stake in this seizure from the privacy interests called into question only by a search. For example, it looks to *Jacobsen* for the notion (Br. 24) that one cannot "'privately' possess[] cocaine," but the Court in the quoted passage was concerned with only "any legitimate interest in privacy." *Jacobsen*, 466 U.S. at 123. The government fails to account for the Court's other holding in the same case, that a seizure of the cocaine "did affect respondents' *possessory interests* protected by the Amendment." *Id.* at 124 (emphasis supplied). Its other citations are similarly in error.

2. *Privacy is of No Moment to The Challenge of A Seizure.* The government focuses on the same irrelevant factor when it argues (Br. 15) that "status as a co-conspirator cannot create an expectation of privacy where one otherwise would not exist." Whatever else may be said about this proposition, its focus on privacy interests is clearly irrelevant to the question of whether defendants have the right to assert that their own possessory interests have been violated by a seizure. While possession may at times be insufficient with regard to the privacy interests that are implicated by *searches*, the court of appeals found that the possession demonstrated by the Simpsons was sufficient for them to challenge a *seizure*.

Consequently, none of the holdings cited by the government applies to the issue presently of concern: whether Officer Fifer's seizure implicated the Simpsons' own possessory interests in the seized contraband. For example, in *Salvucci*, two defendants attempted to contest a warranted search of the home of one of their mothers, which disclosed the stolen mail defendants were accused of possessing. Because the defendants challenged only a search and not a seizure, the Court found it insufficient that they retained possession of the mail they had stashed in the place that was searched. "We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." 448 U.S. at 92. At the same time, the Court specifically distinguished seizures, noting that "possession of the seized good" provides the interest necessary for mounting a Fourth Amendment challenge "if the seizure, as opposed to the search, was illegal." *Id.* at 91 n.6.

Similarly, the Court in *Rakas* merely held that those defendants could not challenge only a search of a vehicle. As Justice Powell noted in his concurring opinion, "[t]he

petitioners [did] not challenge the constitutionality of the police action in stopping the automobile in which they were riding." 439 U.S. at 150-51. Nor had either of them "ever asserted that he owned the rifle or shells" discovered as a result of the challenged search. *Id.* at 129; see also *id.* at 130-31 & n.1. The Court therefore held that those petitioners could not challenge the search of an area in which they "would not normally have a legitimate expectation of privacy," *id.* at 149, although it also recognized the right to "contest the lawfulness of the seizure . . . if their own property were seized." *Id.* at 142 n.11.[18]

This thread -- concern with only privacy interests implicated by searches -- runs throughout the cases that the government has inappropriately cited for a very different (and erroneous) proposition: that possession is an insufficient interest on which to premise a challenge to a seizure. In *Alderman*, 394 U.S. at 171-72, for example, the Court found that "a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself." In *Rawlings*, 448 U.S. at 105, the defendant did claim a possessory interest in the contraband he had stashed in Cox's purse, but the Court found that

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[18] *Wong Sun* is to the same effect. Defendants Toy and Wong Sun also allegedly engaged in a conspiracy to possess and transport narcotics, but they suffered no illegal seizure of constructively possessed contraband. Rather, they sought to challenge only the illegal search of Toy's residence, which led to the subsequent surrender by Yee of narcotics. The Court held that the narcotics were inadmissible "fruit of the poisonous tree" as to Toy only because they were tainted by the illegal search of his residence "and not by any official impropriety connected with their surrender by Yee." 371 U.S. at 492. In the context of Wong Sun's similar challenge to the search of Toy, the Court was unconcerned with whether he possessed the narcotics held by Yee, finding instead that the initial search of Toy "invaded no right of privacy of person or premises which would entitle Wong Sun to object to [the narcotics'] use at his trial." *Id.*

possession insufficient to establish a "legitimate expectation of privacy in that purse," and for that reason he "could not challenge the legality of the search of Cox's purse." In all of the other cases of the Court that the United States has cited, neither a seizure nor a possessory interest was at issue. See *Payner*, 447 U.S. at 729, 732 (defendant could not challenge a "flagrantly illegal search" because defendant "has no expectation of privacy"); *Jones* v. *United States*, 362 U.S. 257, 258 (1960) (concerning "a defendant's standing to challenge the legality of a search").[19]

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[19] The lower court cases cited by the government similarly focused on privacy interests and not possessory interests. *United States* v. *Kiser*, 948 F.2d 418, 424 (8th Cir. 1991) ("legitimate privacy expectations of others may not be vicariously asserted"); *United States* v. *Soule*, 908 F.2d 1032, 1036 (1st Cir. 1990) ("it would be difficult to posit a clearer failure to demonstrate any legitimate expectation of privacy on the part of the defendant"); *United States* v. *Manbeck*, 744 F.2d 360, 374 (4th Cir. 1984) ("Defendants have not submitted any other persuasive evidence of a privacy interest in the tractor-trailer."); *United States* v. *Brown*, 743 F.2d 1505, 1508 (11th Cir. 1984) ("he cannot assert a legitimate privacy interest in contraband hidden on Manikowski's person"); *United States* v. *Little*, 735 F.2d 1049, 1053 (8th Cir.) ("Neither [a defendant's] mere presence in the conspiracy nor the acts of his co-conspirators can give him a legitimate expectation [of privacy] ... where none exists otherwise."), *rev'd on reh'g*, 743 F.2d 1261 (8th Cir. 1984); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981) ("A person has no right to assert the inadmissibility of the fruits of an illegal search unless the challenged conduct invades his own legitimate expectation of privacy."); *United States* v. *Davis*, 617 F.2d 677, 691 (D.C. Cir. 1979) ("Davis has claimed no interest in the premises searched, and his interest in the cocaine was not one that suggested a continuing expectation of privacy."); *United States* v. *Galante*, 547 F.2d 733, 740 (2d Cir. 1976) ("neither appellant was present at the time of the initial search"); *United States* v. *Hunt*, 505 F.2d 931, 942 (5th Cir. 1974) ("Although there may well be cases in which a principal may object to a search of his agent's papers or effects, this is not one of them."); *United States* v. *Gerena*, 662 F. Supp. 1218, 1223-24 (D. Conn. 1987) ("defendants have failed to adequately allege the existence of legitimate expectations of privacy in each of the three locations at issue").

Accordingly, the government's contention that the Simpsons are barred from bringing their claim by a footnote in *Brown* v. *United States*, 411 U.S. at 230 n.4, is untenable. The Court in that case was concerned only that the defendants had "no standing to contest the defective warrant used to search [co-conspirator] Knuckles' store," and not a seizure of any item. *Id.* at 230. For that reason, only privacy and not possessory interests were relevant to the analysis. Moreover, the defendants in *Brown* had specifically failed to assert in the lower courts "a possessory interest in the goods at Knuckles' store." *Id.* at 228. The Court therefore held that no contention concerning possession was properly before it. *Id.* at 230 n.4. Even then, the Court held that the defendants could not have possessed the contraband at the time of the search because they had "already 'sold' the merchandise" and the alleged conspiracy had already ended. *Id.* at 230 n.4; see also *id.* at 225, 229. The *Brown* footnote thus cannot control the present case, where the lower courts have found that the Simpsons possessed the contraband because they directly exercised "joint control and supervision over the drugs" at the time their car was illegally seized. Pet. App. 14a.

In the end, therefore, the government's authorities stand for no more than the rather unremarkable notion that conspirators do not automatically share privacy interests against searches. The stop of the Simpsons' car and its contents was not a search, however, and the virtually exclusive concern of the United States with privacy interests is not germane to the Simpsons' possessory interests implicated by Officer Fifer's seizure. Rather, it is their possession of the contraband -- charged by the indictment, claimed by the Simpsons, and found by the lower courts -- which suffices to demonstrate that the Simpsons' own Fourth Amendment rights were implicated by the seizure,

precisely because an illegal seizure violates "possessory interests where neither privacy nor liberty [is] at stake." *Soldal*, 113 S. Ct. at 543.

III. THE QUESTION PRESENTED BY THE PETITION DOES NOT APPLY TO THE SIMPSONS

The question presented by the United States in its Petition concerned only "whether membership in a joint-venture to transport drugs gives co-conspirators a legitimate expectation of privacy." Pet. (i).[20] As this case reaches the Court with regard to the Simpsons, however, it concerns only whether they retained property or possessory interests that afford them the right to challenge a seizure of their car and its contents, not the privacy interests implicated by a search. To be sure, the Simpsons also separately contested the subsequent warrantless search of their locked trunk, contending that it could not be justified by the consent obtained from Arciniega during the course of his illegal detention. *Cf. Royer*, 460 U.S. at 501. But the district court ruled that, because the stop was illegal, "we just don't get to that issue in this case," Pet. App. 29a, and the court of

[20] The Petition was concerned only with privacy interests, and it therefore urged the Court to review this case only because "[t]he question whether co-conspirators can acquire a legitimate expectation of privacy in each other's persons and effects based solely on their joint participation in a criminal venture is of considerable practical importance." Pet. 6. All of the cases that the Petition discussed therein concerned only privacy interests, and the entire thrust of the Petition's argument was that "[a] defendant's role in a conspiracy has no generative force so as to create a privacy interest that does not otherwise exist." *Id.* at 9. Indeed, the United States concerned itself with only privacy issues in its argument before the court of appeals. C.A. Brief of Appellant at 15-16.

appeals similarly did not address whether the search was illegal or whether it implicated the Simpsons' own privacy interests.[21]

Because the privacy issue presented by the government is irrelevant to the Simpsons, the Court may wish to dismiss the writ of certiorari as improvidently granted as to them.[22] Indeed, the Simpsons' situation is virtually identical to the Court's dismissal in *United States* v. *Quinn*, 475 U.S. 791 (1986).[23] In *Quinn*, the United States also framed the question of Fourth Amendment standing in privacy terms: "[w]hether a defendant has a Fourth Amendment expectation of privacy" arising from his status as "a co-venturer in a criminal enterprise." *Id.* at 791 (Burger, C.J., dissenting). It then became evident that Quinn similarly challenged a seizure, not a search. And for that reason the issue on the merits similarly focussed not on

[21] For that reason, if the court of appeals is reversed, a remand should leave it to that court to determine in the first instance all issues related to the legality of the search of the Simpsons' trunk, including the Simpsons' right to contest it.

[22] Neither is a conspiracy issue presented with respect to the Simpsons, whose ownership of the car is established separately from their participation in a conspiracy. It is perhaps for this reason that, when pursuing certiorari, the United States in its Reply Brief (at 5) did not envision reversal with respect to the Simpsons, but merely the remand of this portion of the case "[i]f the Ninth Circuit's 'co-conspirator standing' rule is wrong . . . to have the standing issue as to the Simpsons decided without reference to that factor." The United States, however, offers no reason why it should be provided a second opportunity in this regard. The Simpsons clearly pressed ownership at the suppression hearing, *e.g.*, T.R. 5/8/90 at 73-74, 76, 81-82, 111-12, 128, and this Court has previously held that it will not remand a case only to afford a party the second opportunity the government seeks. *Rakas*, 439 U.S. at 130-31 n.1.

[23] The Petition in this case (Pet. 16 & n.7) reviewed the history of the *Quinn* litigation.

privacy, but on Quinn's claim that his right to bring a challenge was predicated on his property interests in the seized vessel and his possessory interest in the illegal drugs on board. *Id.* at 793. These property and possessory interests were not fairly included in the privacy question that had been presented, however, and the Court dismissed the writ.

Here, too, the property and possessory interests implicated by the seizure of the Simpsons' car and the contraband contained therein are not fairly included within the question presented in the Petition.[24] For that reason, the Court may wish to decline the government's invitation to address issues related to the Simpsons.

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[24] Nor have these issues been properly presented by the government's substitution of a new question presented in its Brief (Br. (i)), which now embraces "property interest[s]." Rule 24.1(a) of this Court states that "the brief may not raise additional questions or change the substance of the questions already presented," and Rule 14.1(a) states that the court will address "[o]nly the questions set forth in the petition, or fairly included therein." Property and privacy interests are "different interests" that are complementary but not subsidiary to one another, *Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987), and for that reason a question that concerns privacy does not fairly include property. *Cf. Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1533 (1992) ("a question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented . . . is not 'fairly included therein'"); *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

CONCLUSION

If the writ of certiorari is not dismissed as to the Simpsons, the judgment of the court of appeals should be affirmed as to them.

Respectfully submitted,

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